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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 348

BROWN & WILLIAMSON TOBACCO CORPORATION, LIGGETT & MYERS TOBACCO COMPANY, R. J. REYNOLDS TOBACCO COMPANY and THE AMERICAN TOBACCO COMPANY,

Petitioners,

v.

HELLENIC LINES LIMITED, respondent and claimant of the S.S. ANGHYRA, her engines, boilers, etc., and WEST OF ENGLAND STEAMSHIP OWNERS PROTECTION & INDEMNITY ASSOCIATION, LIMITED,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GEORGE YAMAOKA,
Counsel for Respondents,
26 Broadway,
New York 4, N. Y.

JAMES E. FREEHILL,
FRANCIS P. KELLY,
HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
Of Counsel.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

The Questions Presented

Contrary to the impression sought to be created in the petition, the Court of Appeals did not decide any question of law in conflict with the decisions of this Court or any other Circuit. We urge denial because the contentions

made are specious and because the case does not involve any principle of law of importance to the public. Further, this litigation ought now to be terminated, having already endured for some nineteen years.

Statement

(a) Background

In December 1940, Germany had completed her conquest of many countries on the Continent and was in possession of bases on the Mediterranean Sea. Since her ally, Italy, had invaded Greece, it was then impossible to ship Turkish leaf tobacco grown in Turkey, Bulgaria and Greece to the United States via Gibraltar. In normal times, such shipments were always made by that route in the cool months because tobacco is "susceptible to self-heating in hot weather" (app. 3-4).* As petitioners were already committed to take large quantities of this tobacco, all efforts were made to induce the Greek Government to release ships to carry it to this country via Suez, the Red Sea and the Cape of Good Hope. Thus, at the behest of two of the petitioners, the Greek Government released the S.S. Anghyra from requisition as a troop carrier for the purpose of making a voyage to the United States via Suez with tobacco and returning with war materials (app. 3). This was an unprecedented voyage for leaf tobacco, involving considerable risk because of its inherent nature and the extreme heat encountered in twice crossing the equator (A. 10). The petitioners preferred to take this risk rather than leave their tobacco abroad and suffer the loss of their investment (A. 4).

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* The letters "app." refer to the appendix to the petition, consisting of the opinion of the Court of Appeals. The letter "A" is used to designate the "Appendix to Brief for Appellants" (white cover) filed in the court below.

Before sailing from Piraeus, the last loading port, a majority of the crew was conscripted into military service and the captain was forced to accept replacements from a labor pool. Most of his crew were thus new and not of his selection (A. 9, app. 7). The vessel was required to sail in convoy and at all times was under the control of the British Admiralty (app. 4). While in the Suez Canal, where blackout regulations were in force, the vessel was under aerial attack at night from enemy airplanes, and a vessel behind her in convoy had been torpedoed (A. 64-65).

Thus, the *mise en scène* of this lawsuit had been fully laid.

(b) The Essential Facts

As was observed by the Court of Appeals, the trial court found no fault with the ship, except when the captain shut down the dynamo during nighttime in blackout ports to enforce compliance with the orders of the British Admiralty (app. 6). Since the reversal was upon the ground that the captain was not negligent in shutting down the dynamo because the safety of the ship was threatened by enemy air raids and imminent gunfire, and that, even if the captain was at fault, it was an error in the management of the ship, for the consequence of which her owners were exempted under the Carriage of Goods by Sea Act, we shall only advert to those facts that support the correctness of this conclusion.

The dynamo supplied all of the ship's needs for electricity, including power to operate the motors that turned the fans in the cargo ventilators (app. 11). Power for these fans could not be maintained without making electric power available for lights in the crew's quarters, both in the forward and after parts of the ship, as well as equip-

ment used for communications, refrigerators and other electric appliances (app. 11).

Enemy air attacks had been mounted against ships and other targets in the area of the Suez Canal, which made it necessary to strictly enforce the blackout regulations (app. 5; 64-5).

When the ship was at Port Said, on a stand-by basis awaiting the formation of a convoy, the captain was summoned by the British Admiralty. He was told that a light had been seen on his vessel the night before and that if it occurred again British batteries would open fire on his ship (app. 4-5).

Although there were two policemen on the vessel to guard against sabotage, it was assumed that the light was exposed by a member of the crew (app. 7). Most of the crew were new because a majority of the original crew had been conscripted into military service at Piraeus and the captain was forced to accept replacements from a labor pool (A. 9; app. 1). When the captain told the British Naval officers that he was using his dynamo to supply current to his refrigerators and cargo ventilator fans, they told him, "Cut off this dynamo and be quiet about this and avoid trouble", for if a light were again shown "they would shoot the light from the batteries" (Resp. Ex. 10,* pp. 762, 765-6). While the captain did not say that he was ordered to shut down the dynamo, he testified that this means of compliance had been pointed out to him by the British Naval officers and that he regarded their suggestions "as orders" (app. 6).

Before shutting down the dynamo, the captain considered removing all light bulbs but was ordered by the anti-sabotage policemen on board not to do so. They told

* Respondents' Exhibit 10 is the deposition of the Captain and Chief Engineer.

him it might be necessary to use the lights to rescue any men from the sea during an air raid, and accordingly instructed him to keep a watch on the dynamo (Resp. Ex. 10, p. 763; app. 7). Power could not be cut off to the lights in all of the crew's quarters, located in the forward and the after parts of the ship, and at the same time maintain power for the cargo fans (app. 7; Resp. Ex. 10, pp. 897-907).

During the nighttime hours, when the dynamo was shut down cutting off power to the fans, the ventilators were kept open as well as the weather deck hatches (app. 8, 12). Thus, air could move through the ventilators and through the open weather deck hatches. Petitioners' principal witness, Captain Evanson, a former master, admitted that "opening the weather deck hatches helps considerably" in "getting air into" the holds (A. 236). This witness also admitted that "at nighttime, when the sun goes down and cools off, it wouldn't make much difference whether you worked your fans or not" (A. 236). The temperature records at the blackout ports during the period the dynamo was shut down reveal that the heat was not extreme, and that the drop in temperature ranged between about 12° to as much as 20° on the average (app. 9).

The trial judge expressly found "that no witnesses testified that the cargo suffered any damage because the fans were not in operation during blackout hours" (A. 17). Despite this finding, the trial judge nevertheless made a contrary finding "that damage resulted" during those blackout hours (A. 18). This was pure conjecture. The Court of Appeals accepted this finding without examination of the premises upon which it was based, for the expressed reason that the interruption of the operation of the fans at night "was not a fault for which the ship is responsible" (app. 6).

(c) The Opinion of the Court of Appeals

The Court of Appeals held that under the factual circumstances the captain was fully warranted in cutting off the dynamo to enforce certain compliance with the blackout regulations and to avoid threatened destruction of the ship and crew, that he did not act unreasonably in taking the suggestion of the British Naval officers as an order, and that even if any fault might be found with his decision, the fault was one of management of the ship, for which neither the ship nor her owner could be held liable under the Carriage of Goods by Sea Act. In reaching this conclusion, the Court stated (app. 7-8, 9-10, 10-11, 12):

> "One member of the crew intentionally, or inadvertently, had permitted a light to be shown. The captain had been told forcefully to take steps to assure that a member of his crew did not again open a door inadvertently, or inadvertently leave a light on behind him when opening a door. The naval officers had not temporized with him. Threatened with destruction of his ship and crew, it was no time for him to temporize with his crew or his cargo.
>
> "We think the orders of the British Admiralty required him to take steps which would assure certain compliance, not probably compliance, with the black out regulations. Certainty could be achieved only by cutting off the dynamos. That is what the Admiralty suggested, and under the circumstances, the captain not unreasonably took the suggestion as an order.
>
> • • •
>
> "If now in the peace of a quiet chamber, fault might be found with the captain's decision, made when protection from recurrent air raids and imminent gunfire was of primary importance, the fault is one of management of the ship, for which neither the ship nor her owner is responsible under the

Carriage of Goods by Sea Act. Section 4(2)(a) exonerates the ship and her owners for damage caused by neglect of the master in the navigation or in the management of the ship.

* * *

"Under the earlier Harter Act and COGSA, the ship's liability turns upon the answer to the question whether the fault related primarily to the management of the ship or primarily to the care and handling of her cargo.' As Mr. Justice Holmes put it:

> '... * * If the primary purpose [of shifting ballast] is to affect the ballast of the ship, the change is management of the vessel; but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections; and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss.'

"The purpose in cutting off the dynamos was to protect the vessel as a whole, the ship, her crew and her cargo, from enemy bombs and British gunfire.

* * *

"The captain was not indifferent to the care of his cargo. He acted as he did, despite his consciousness of the desirability of continuous cargo ventilation, because he thought the safety of the ship required it. Whether one may now say he was right or wrong, his purpose was the protection of his vessel from threatened danger. His acts in furtherance of that purpose cannot be the basis of liability for cargo damage under COGSA."

Reasons for Rejecting the Petition

(a) The first question presented by the petitioners (Point I, pp. 10-15) emasculates the decision of the Court of Appeals to create an erroneous impression that it is in conflict with a decision of this Court and decisions of Courts of Appeal of other Circuits.

The Court of Appeals made it patently clear that *the primary purpose* in cutting off the dynamo at night in the blackout ports was to protect the vessel as a whole from enemy bombs and threatened gunfire by the British authorities and that "If now in the peace of a quiet chamber, fault might be found with the captain's decision", it was an error in management of the vessel, for which neither the ship nor her owner was legally responsible under the Carriage of Goods by Sea Act. Nowhere in the opinion or record is there any finding or evidence that the primary purpose of shutting down the dynamo was done at all in connection with the cargo. Its primary purpose was the safety of the ship, her crew and cargo and accordingly was an act performed in the management of the vessel.

The decision of the court below on this question of law adopted the "primary purpose" rule enunciated by Mr. Justice Holmes in *The Germanic*, 196 U. S. 589 (1904), which has been followed by the Court of Appeal of other circuits.

In *Bernstein Co. v. M/S Titania*, 1955 A.M.C. 2040, aff'd. 232 F. 2d 771 (C.A. 5), it was necessary, because of heavy weather, to fill the empty deep tanks with sea water ballast for better trim of the vessel. In the course of doing so, a member of the crew negligently left off a

manhole cover of one of the deep tanks of a cargo hold, so that he might visually check the height of the water, with the result that the water flowed over the tank top and damaged the cargo. This negligent act was held to be an error in management of the vessel, since the primary nature and object of the act which caused the loss was the general care and safety of the whole vessel.

In *Raccoccetti* v. *United States*, 88 F. 2d 118 (C. A. 2), cert. den. 301 U. S. 707, the master erroneously believed that cotton in one of the vessel's holds was smoldering from a fire. The master ordered the cotton to be washed down. Although there was in fact no fire, the vessel owner was relieved from liability for the consequent damage because the primary purpose of the negligent act was "an effort to save the ship from what seemed to be impending disaster from fire", and therefore "primarily as a part of the management of the ship".

The uncontradicted evidence was, as found by the court below, that during the blackout hours the cargo was not deprived of ventilation for the ventilators were kept open permitting air to move through them, and that to compensate for any reduction in ventilation the weather deck hatches were opened each night (app. 6). Petitioners' principal expert admitted that opening these hatches helped considerably in getting air into the holds and that it didn't "make much difference" whether the fans were working at night when "the sun goes down" and "cools off" as it did in the blackout ports (A. 236). Thus the court below properly concluded that the captain, in keeping the weather deck hatches opened at night, demonstrated that he "was doing what he could to protect the cargo while complying with orders he was bound to obey" (app. 8-9).

PETITIONERS' AUTHORITIES ARE INAPPOSITE

An analysis of the decisions cited and discussed by petitioners, such as *The Vallescura*, 293 U. S. 296, reveal that they deal with acts done by a captain solely in the care and custody of cargo and that such acts had utterly nothing to do with navigation or management of a vessel or her safety.

In *The Vallescura* case, 43 F. (2d) 247; 293 U. S. 296, the cargo ventilators and hatches were at all times closed at night even in good weather. Since such act related solely to the care and custody of the cargo and had nothing to do with the safety of the vessel, this Court properly concluded that the negligent act did not concern the management of the vessel.

In *The Naples Maru*, 106 F. (2d) 32 (2 Cir.), the bowls of the ventilators were removed without excuse. This negligent act was held to relate solely to the care of the cargo rather than to management of the ship.

In the above cases, as well as the others cited by petitioners, the negligent act related primarily, and indeed exclusively, to the cargo, and therefore was not an act of management of the vessel. In none of those cases was the primary purpose of the negligent act to save or protect the vessel. This distinction is made clear in the decision of this Court in *The Germanic*, *supra*, but has been entirely overlooked or ignored by petitioners.

(b) The second question presented (Point II, pp. 16-26) does not arise if the court below was correct in holding, as a matter of law, that shutting down the dynamo was an act done for the safety of the ship and therefore in the management of the vessel, for the consequences of which the carrier was exempted from liability. In any event, the effect of the British Admiralty order upon the mind of the master whose testimony was given in a deposition was a matter of ultimate or legal inference, which the Court of Appeals was equally capable with the District Court of drawing.

The "clearly erroneous" rule is primarily intended to protect only a finding of fact made from conflicting testimony where the trial court has had an opportunity to observe the demeanor of the witnesses. Where a finding results from an inference based upon the possible effect of an event such as a military order upon the mind of a captain, the Court of Appeals is free to draw its own conclusion.

Moreover, negligence is a conclusion of law which the Court of Appeals may review free of the impact of this rule. See *Virbeck* v. *Black Diamond Steamship Corp.* (2 Cir.) 269 F. (2d) 68, 70; cert. den. 361 U. S. 934; *Aetna Casualty & Surety Co.* v. *De Maison* (3 Cir.) 213 F. (2d) 826, 829. *River Terminal Corp.* v. *Southwestern Sugar and Molasses Co., Inc.*, 274 Fed. (2) 36, 37.

The Petition for Certiorari in this matter takes vehement and lengthy (pp. 16-26) exception to the following passage in the opinion of the Court of Appeals for the Fourth Circuit (App. 8):

> "We think the orders of the British Admiralty required him [the master] to take steps which would assure certain compliance, not probable com-

> pliance, with the black out regulations. Certainty could be achieved only by cutting off the dynamos. That is what the Admiralty suggested, and under the circumstances, the captain not unreasonably took the suggestion as an order."

To this passage the Court appended the following footnote, citing cases in support of its position:

> "Our statement of facts is taken, largely, from the findings of the District Court. We differ with him only as to the ultimate inference to be drawn from the evidentiary facts; that is, whether, under the circumstances, the 'suggestion' of the Admiralty was an order with which the captain reasonably felt compelled to comply. It is appropriate to observe, however, that the evidence about the incident is in depositions, and that the scope of review of findings of fact is not as narrow as it would be if the District Court had seen and heard the witnesses."

The holding of the Court of Appeals, together with its supporting footnote, is amply justified by the precedents.

(1)

Rule 52(a) of the Federal Rules of Civil Procedure, the "clearly erroneous" rule, is heavily stressed by the petitioners herein, who seem to take comfort from it. The comfort is undeserved. The testimony relied upon by the District Court and by the petitioners as to the effect of the order, directive or "suggestion" of the British Admiralty was embodied in a deposition. Rule 52(a) is primarily and chiefly intended to protect only a finding of fact made from among conflicting testimony where the trial court has had an opportunity to observe the demeanor of the witnesses.

We start with the language of the rule itself. It states in pertinent part:

> "Findings of fact shall not be set aside unless clearly erroneous, *and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*" (Italics ours.)

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394-5 (1948), Mr. Justice Reed interpreted Rule 52(a) in these terms:

> "It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice * * *. The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, *when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court.* The findings were never conclusive, however." (Italics ours.)

Similarly, in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341 (1949), Mr. Justice Jackson commented:

> "*Findings as to the design, motive, and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.* If defendants' witnesses spoke the truth, the findings are admittedly justified. *The trial court listened to and observed* the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends." (Italics ours.)

Very much in point indeed is the opinion of the Ninth Circuit in *Stevenot* v. *Norberg*, 210 F.(2d) 615, 619 (1954):

> "Appellees argue that we are bound by the foregoing findings, since the record does not show that

> they are clearly erroneous. We do not think so. *When a finding is essentially one dealing with the effect of certain transactions or events rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions.*" (Italics ours.)

Very recently, in *Skinner* v. *Parnell*, 257 F.(2d) 345, 346 (C.A. 10, 1958), the Court of Appeals for the Tenth Circuit held:

> "Since the testimony upon which the trial court has based the finding that Mrs. Skinner survived her husband was submitted by deposition this court is in as good a position as the trial judge to evaluate such testimony and the scope of review is enlarged to the extent, but only to the extent, that no regard need be given to the opportunity of the trial court to observe the witness."

The Seventh Circuit pithily showed its understanding of Rule 52(a) in *Wisconsin Memorial Park* v. *Commissioner*, 255 F.(2d) 751, 753 (1958), when it said:

> "Under Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A., *regard must be had for demeanor evidence* depending, of course, upon the significance of credibility in each case." (Italics ours.)

Professor Moore states (5 *Moore's Federal Practice*, Second Edition, Par. 52.04, p. 2637):

> "In *Carter Oil Co.* v. *McQuigg* [(CCA 7th 1940) 112 F. 2d 275] the court declared that a district court's findings of fact, where the testimony consists of documentary evidence and depositions, is 'subject to free review unaffected by presumptions which ordinarily accompany • • • findings on controverted issues.' *A number of courts likewise have*

> *hold that findings of fact based on documentary evidence, on uncontradicted testimony, on stipulated facts, on testimony taken by depositions, and in similar situations where credibility is not seriously involved or, if it is, where the receiving court is in just as good a position as the trial court to judge credibility, are not binding on the appellate court and will be given slight weight on appeal."* (Italics ours.)

In support of this proposition, Professor Moore cites cases from the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth and District of Columbia Circuits.

Similarly, Professor Moore observes (5 *Moore's Federal Practice*, Second Edition, Par. 52.03, p. 2615):

> "In being 'well persuaded' [to reverse] it is pertinent to distinguish between demeanor testimony, if credibility is involved, for here the trial court has a decided advantage as Rule 52(a) recognizes, and documentary and other non-demeanor testimony where the appellate court has the same advantage in analyzing the testimony; and between primary inferences drawn from demeanor testimony, which the trial court is best capable of making, and secondary inferences drawn from primary inferences, which theoretically the appellate court is equally able to draw."

(2)

The effect of the order of the British Admiralty upon the mind of the master of the AXCHYRA was a matter of secondary or legal inference. The Court of Appeals is equally capable with the District Court of drawing the appropriate inference. Any inference drawn by the District Court did not go to the Court of Appeals freighted with, and protected by, the full rigor of the provisions of Rule 52(a).

In *Sears, Roebuck & Company* v. *Johnson*, 219 F.(2d) 590 (C.A. 3, 1955), the Court of Appeals held:

> "In disturbing a district court's finding of basic facts, this court is guided by the 'clearly erroneous' provision of Rule 52(a). But Rule 52(a) is not applicable where, as here, the dispute is not as to the basic facts, but as to what inference (i.e., ultimate fact) should reasonably be derived from the basic facts. This court, by examining the basic facts found by the district court, can determine, as advantageously as the district court can, whether or not an inference of likelihood of confusion is warranted."

This excerpt was approved and followed in *United States* v. *One 1950 Buick Sedan*, 231 F.(2d) 219 (C.A. 3, 1956).

In *Galena Oaks Corporation* v. *Scofield*, 218 F.(2d) 217, 219 (1954), the Fifth Circuit held as follows:

> "It is also true, however, that the burden of showing a finding of fact 'clearly erroneous' is not a measure of exact and uniform weight * * *. The burden is especially strong when the trial court has had the opportunity, not possessed by the appellate court, to see and hear the witnesses, to observe their demeanor on the stand, and thereby the better to judge of their credibility * * *. *The burden is lighter, much lighter, when we consider logical inferences drawn from undisputed facts or from documents, though the 'clearly erroneous' rule is still applicable* * * *. *Insofar, however, as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is subject to review free of the restraining impact of 'the so-called "clearly erroneous" rule.'*" (Italics ours.)

Similarly, in *Lehmann* v. *Acheson*, 206 F.(2d) 592, 594 (1953), the Third Circuit held:

> "The District Court found as a fact that expatriation had taken place. With respect to that finding it must immediately be noted that it was in the nature of an ultimate finding of fact and on that score it is well settled that such a finding is but a legal inference from other facts and as such is subject to review free of the restraining impact of the so-called 'clearly erroneous' rule applicable to ordinary findings of fact by the trial court."

(c) The third question presented (Point III, pp. 27-33) does not arise, for, contrary to petitioners' contention, the District Court found that the cargo was stowed in accordance with the custom and usage in the trade.

The District Court found no fault with the ship, except in respect to the shutting down of the dynamo at night to enforce compliance with the orders of the British Admiralty. This was noted by the court below (app. 6). There can be no doubt about this, for the District Judge, on rehearing, stated (A. 311):

> "The Court: As I indicated in my opinion, but perhaps in a very awkward manner, what turned me on this case was the cutting off of the dynamo."

Petitioners attempt to give the impression that the District Judge left the issue of stowage undecided. However, the court expressly found that the method of stowage was customary and usual in the trade, as appears from the following portion of the opinion (A. 14):

> "With one exception[7] all witnesses stated that the

[7] The exception is Captain Evanson who testified that too much tobacco was stowed in the lower holds without a break or channel of space in the stow. But this witness does not contend that his own method of stowage is the accepted or general method employed."

'block stowage' system employed was customary in the usage of the trade. With respect to stowage, a similar method was held to be proper and customary in *American Tobacco Co.* v. *The Katingo*, 81 F. Supp. 438, 443, modified and affirmed 194 F. (2d) 449, certiorari denied 343 U. S. 978.*

The trial judge also noted that representatives of two of the petitioners were present at the loading ports to observe the stowage and that none of them registered any objection or offered any suggestion which, he said, "significantly points to an accepted procedure under normal conditions" (A. 15).

The District Court, in referring to the accepted practice in stowing cargo on trips via Gibralta, undoubtedly had in mind that this type of tobacco had never been shipped to the United States via Suez, prior to this voyage and certainly did not mean to imply that a different procedure was required to be followed in stowing the cargo via Suez than for a voyage via Gibralta.

(d) The last question presented (Point IV, pp. 33-35) does not arise as there was no voluntary sacrifice of the tobacco cargo.

This question was never raised by petitioners in the District Court. In any event, it is well settled that a case for general average does not exist unless there is a voluntary sacrifice of cargo, such as "a voluntary jettison" of cargo. *Barnard* v. *Adams*, 51 U. S. (10 How.) 270, at 303.

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* The tobacco on the KATINGO, which made a similar voyage via Suez with the same type of stowage, outturned from the No. 2 and No. 4 holds without any self-heating damage, except for a few bales in the top tiers.

There is utterly no evidence in this case that any of the tobacco cargo was sacrificed during the blackout periods when the dynamo was shut down. As heretofore mentioned, and as found by the court below, the captain took measures to see that the cargo was ventilated by keeping the ventilators and the weather deck hatches open. Moreover, petitioners' chief witness, Captain Evanson, testified that it was immaterial whether ventilator fans were operating at night when the temperature dropped, which it did at the blackout ports.

Thus, there is no proof that the captain permitted the tobacco to be voluntarily sacrificed during the period when he was taking appropriate action to enforce the blackout regulations and to safeguard his vessel from destruction. Although the trial judge erroneously assumed that some damage occurred during these periods, he expressly conceded that no witness had testified that the tobacco sustained any damage when the cargo fans were not in operation.

(e) The points raised are of no general importance.

For many years, the courts have rendered decisions construing the exemptions of a carrier's liability for errors or faults of a ship captain in the management of a vessel. The case thus does not present any question that is novel or unique, or of such general importance to warrant the Court in granting this petition. There is no conflict be-

tween the decisions of the different Circuits on any of the questions presented in the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE YAMAOKA,
Counsel for Respondents.

JAMES E. FREEHILL,
FRANCIS P. KELLY,
HILL, BETTS, YAMAOKA, FREEHILL,
& LONGCOPE,

Of Counsel.

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